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No. 513.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1950.

SAMUEL HOFFMAN,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals for the Third Circuit
(R. 22) filed December 8, 1950, is reported at 185 F. 2d 617.

JURISDICTION.

The jurisdiction of this Court is invoked (1) under the Fifth Amendment of the Constitution of the United States which grants defendants in criminal cases the privilege against self-incrimination and (2) under the Act of June 25, 1948, C. 646, 62 Stat. 928 (28 U. S. C. A. 1254 (1)).

The judgment to be reviewed, as above stated, is the judgment of the United States Court of Appeals for the Third Circuit, entered on December 8, 1950, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania and the judgment entered on December 27, 1950 denying petitioner's request for a rehearing.

QUESTIONS PRESENTED.

1. Is it a violation of the Fifth Amendment of the Constitution of the United States to adjudge in contempt a witness before a federal grand jury for failing to answer certain questions, where the facts and circumstances establish that the witness was in real and genuine fear that his answers might incriminate him or furnish a link in the chain of evidence necessary to establish the commission of a federal offense?

2. Was it error for the Court of Appeals to strike from the record the data relied upon by petitioner in support of his claim of privilege because it was not called to the attention of the lower court until after it had found him in

contempt, although the data had been presented to that court prior to the argument of the appeal?

3. Was it error to affirm a conviction for contempt for refusing to answer questions concerning the whereabouts of an individual for whom a subpoena had been issued but not served, where the record shows that shortly after petitioner's commitment the said individual voluntarily had appeared before the grand jury?

STATEMENT.

The petitioner was found guilty of contempt of court in refusing to answer certain questions propounded to him by a special federal grand jury sitting in Philadelphia and, on October 5, 1950, was sentenced to a term of five months imprisonment therefor.

An appeal was taken to the Court of Appeals for the Third Circuit which, on December 8, 1950, affirmed the conviction. Thereafter petitioner filed a petition for a rehearing which was denied on December 27, 1950.

Thereafter petitioner filed in this Court a petition for a writ of certiorari which was granted on March 12, 1951.

The record discloses the following facts:

Petitioner was subpoenaed to appear and testify before the grand jury and, in response to said subpoena, he appeared on September 14, 1950. He was ultimately called as a witness on October 3, 1950 when he testified, inter alia, as follows:

"Q. What do you do now, Mr. Hoffman?

A. I refuse to answer.

Q. Have you been in the same undertaking since the first of the year?

A. I don't understand the question.

Q. Have you been doing the same thing you are doing now since the first of the year?

A. I refuse to answer.

Q. Do you know Mr. William Weisberg?

A. I do.

Q. How long have you known him?

A. Practically twenty years, I guess.

Q. When did you last see him?

A. I refuse to answer.

Q. Have you seen him this week?

A. I refuse to answer.

Q. Do you know that a subpoena has been issued for Mr. Weisberg?

A. I heard about it in Court.

Q. Have you talked with him on the telephone this week?

A. I refuse to answer.

Q. Do you know where Mr. William Weisberg is now?

A. I refuse to answer."

Petitioner persisted in his refusal to answer the aforesaid questions on the ground that he might incriminate himself of a federal offense (R. 7) and he was sentenced as aforesaid.

After commitment, petitioner filed in the District Court a petition for reconsideration of allowance of bail pending appeal, supported by his affidavit setting forth the facts upon which he had based his refusals to answer (R. 7-10). The affidavit had attached thereto as exhibits certain newspaper articles containing the trial court's charge to the grand jury in which he stated that the "investigation will run the gamut of all crimes covered by federal statute" and referring to petitioner as a notorious underworld char-

acter with a twenty year police record including a conviction and prison sentence on narcotics charges, an acquittal for murder and innumerable arrests on gambling charges (R. 11). One of the exhibits (R. 14) is a photograph of petitioner sitting with the local head of the United States Bureau of Narcotics. Another article (R. 15) refers to the effort by the special federal prosecutor to obtain a bench warrant for Weisberg. On October 24, 1950 petitioner was released in \$10,000 bail.

With respect to the first group of questions—relating to his occupation—petitioner argued in the Court of Appeals that his answers might well amount to a confession of guilt of commission of a federal offense and that with or without the data submitted after commitment, the District Court erred in finding him guilty. The Court of Appeals recognized that the data would have been "adequate to establish circumstantially the likelihood that appellant's assertion of fear of incrimination was not mere contumacy" (R. 28), but on motion of the government struck this information from the record because it was not before the District Court when it found petitioner guilty (R. 28).

The Court of Appeals divided on the question whether, this information aside, there was enough before the trial court to suggest that the claim of privilege was not groundless (R. 28-29).

With reference to the second group of questions—the whereabouts of the witness Weisberg—petitioner argued in the Court of Appeals that the issue was moot since, prior to both the application for bail and the argument of the appeal, Weisberg had voluntarily appeared as a witness before the grand jury. This position was not contested by the government. Petitioner argued further that his claim of privilege was justified since a subpoena had been issued for Weisberg, but not served, and government counsel had publicly stated in court that he would seek a bench warrant for him. Petitioner's claim, therefore, was based on possible

incrimination under Sections 371 and 1501 of the Criminal Code having to do with the obstruction of justice.

The Court of Appeals held, in this connection, that petitioner was no different from any other witness who might have been asked this question—that there was nothing “to differentiate [him] at all or in any significant way from a considerable number of blameless people”—and, therefore, his answer could not “come dangerously close to involving him in a federal offense” (R. 25). Petitioner had, in the lower court, pointed out that he was a notorious criminal and, indeed, the writer of the opinion for the Court of Appeals stated that “the court should have adverted to the fact of common knowledge that there exists a class of persons who live by activity prohibited by federal criminal laws and that some of these persons would be summoned as witnesses in this grand jury investigation” (R. 29).

Petitioner thereafter petitioned for leave to reargue before the Court of Appeals that he should be given the opportunity, particularly in view of the serious constitutional question involved, to present to the court below the facts upon which he had relied for his claim of privilege and of which he had erroneously believed that court was aware. Petitioner also urged the Court of Appeals to grant a rehearing on the basis of the case of *Blau v. United States*, decided in this Court on December 11, 1950 (R. 30-34).

Petitioner now seeks to review the action of the Court of Appeals in affirming the judgment of the District Court and in denying the petition for a rehearing.

ARGUMENT.

I.

The Court of Appeals was unanimous in holding that petitioner could have shown beyond question that there was facing him a real danger of incrimination insofar as the first group of questions—those relating to his occupation—was concerned. The evidence introduced in support of his motion for reconsideration of the matter of bail was held to be clearly adequate for this purpose.

However, since those data were stricken on motion of the government, the majority of the Court was of the opinion that petitioner had not sustained his burden of showing the trial judge the "incriminatory possibilities of the question" (R. 27).

The writer of the Court's opinion differed from the majority in this connection. He stated that even without the data subsequently furnished, the trial court should have adverted to the facts at his disposal—the nature of the investigation and the class of persons being summoned as witnesses—to establish the likelihood of good faith in the claim of privilege (R. 28-29).

We contend that the trial judge should sit *in vacuo* in matters of this sort, particularly where it is clear that the judge, having charged the grand jury, was intimately familiar with the entire atmosphere of the investigation. As was stated by Taft, J. (later Chief Justice) in *Ex parte Irvine*, 74 Fed. 954, wherein he quoted from Wharton on Criminal Evidence as follows (page 960):

"The question is for the discretion of the judge and, in exercising this discretion, he must be governed as much by his personal perception of the peculiarities of

the case as by the facts actually in evidence" (Emphasis supplied).

This is not simply a case of an "ordinary witness" being interrogated by the grand jury. It is rather the case of a potential defendant—one of a class publicly stated by the United States Attorney to be the primary object of his inquiry into the violation of the "gamut of federal offenses." An *ordinary* defendant is never summoned before the usual grand jury for interrogation. We submit that it is "abhorrent to the instincts of an American" to permit a United States Attorney to use the machinery of a special grand jury to obtain incriminatory evidence from one known to be the object of the Government's pursuit.

It is clear that the trial judge did not take into consideration any factors other than the naked question and the refusal to answer. The minority of the Court of Appeals believed that he should have considered all of the circumstances, as did petitioner. If the petitioner were in error in assuming that the trial judge knew of his background and the nature of the grand jury investigation he attempted to correct this error by presenting the facts to the trial court in the bail matter, before the appeal was heard.

The Court of Appeals, in granting the government's motion to strike these data, held, in effect, that petitioner had waived his rights by failing to introduce this evidence prior to his commitment. Yet it is clear that if petitioner or his counsel erred in assuming that the lower court was fully aware of all of the facts later furnished, it was the type of error which, in the interest of justice, petitioner should be permitted to correct.* Thus, since the trial court was furnished with the data prior to the argument of the appeal and since the data admittedly would have made petitioner's claim of privilege well-founded, we submit that at the very

* Particularly since the writer of the opinion below agreed with petitioner's analysis of the situation.

least petitioner should have been afforded the opportunity to present the facts anew to the trial court.

This Court very recently (February 26, 1951) had before it the case of *Jane Rogers v. United States* (95 L. ed. Advance Reports 374) involving the waiver of the right to claim constitutional privilege. The dissenting justices there stated: "The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it." In the case at bar, neither petitioner nor his counsel had *that* difficulty,** but rather erred, according to the majority of the Court of Appeals, in failing to introduce evidence, admittedly available, to support his claim. If petitioner and his counsel did so err, it is apparent that their error resulted from their belief that all of the facts were known to both the trial judge and the prosecutor and it would have been futile to present formal proof thereof on the theory that "the law never requires the doing of an idle thing": *Estes v. Potter*, 183 F. 2d 865 (C. A. 5).

In any event, this Court has always been loath to find that constitutional rights have been waived. As was stated by Mr. Justice Black in *Johnson v. Zerbst*, 304 U. S. 458, 464, 82 L. ed. 1461, 1468:

"It has been pointed out that 'courts indulge every reasonable presumption against' waiver of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'"

See also *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 751-752.

We submit that the Court of Appeals has forfeited petitioner's constitutional rights on the basis of unrealistic procedural technicalities. We know of no case in which so

** Petitioner's refusals to answer were noted on the record as based upon the ground that he might incriminate himself of a federal offense (R. 7).

fundamental a right as the privilege against self-incrimination has been so lightly cast aside: Cf. *Jane Rogers v. United States*, *supra*.

II.

With reference to the second group of questions—relating to the whereabouts of Weisberg—the Court of Appeals recognized that there was likelihood of dispute over the application of the Marshall rule as laid down in the *Burr Case* (R. 25). The Court made no reference to petitioner's argument that the question was really moot in view of Weisberg's voluntary appearance as a witness both prior to the motion for allowance of bail and the argument on appeal. All parties assumed that this group of questions was out of the case; indeed, in the Government brief on appeal, no argument whatsoever was made on this phase of the case.

In the Government's Brief in Opposition, it was stated that this argument is specious on the theory that the contempt was complete upon petitioner's refusal to answer (Brief, pages 20-21, footnote). We do not believe that any witness should be punished by imprisonment for failing to answer questions admittedly no longer important to the Government's inquiry. However, petitioner's principal point here is that the Government itself had abandoned the matter entirely and had rested its desire for petitioner's imprisonment solely upon his refusal to answer those questions relating to his occupation. The Government has yet to deny this abandonment.

Petitioner does not base his argument solely upon this technicality and will assume, *arguendo*, that the Weisberg questions were properly before the Court. We contend that petitioner's claim of privilege should have been sustained under all the authorities.

At the outset, we must register astonishment at the

Government position as expressed in its Brief in Opposition. It was there said (Brief, page 20):

"Even taking account of the fact that Weisberg, being desired as a witness, had been subpoenaed but could not be found, there has been no showing (or even suggestion) in the record that petitioner conspired with Weisberg to evade service of the subpoena. A more reasonable explanation of petitioner's desire not to reveal Weisberg's whereabouts, or when he had last seen him, is that he wished to shield Weisberg from interrogation by the Government."

Certainly it cannot be seriously contended that petitioner, to be protected, must answer: "Since I in fact had conspired with Weisberg to evade the subpoena and thus obstruct justice, I refuse to answer." This would compel him to go far beyond what Judge Learned Hand referred to as "the door's being set a little ajar": *United States v. Weisman*, 111 F. 2d 260 (C. C. A. 2).

Likewise, we are not in the realm of what is or is not *reasonable* under the circumstances. It may well be that petitioner did want to protect Weisberg from the treatment to which he (Hoffman) was being subjected (as occurred in the *Jane Rogers* case), but he did not so state. He did say that the answers would tend to incriminate him and, we submit, since the *Burr* case, as lately confirmed by this Court, "he must be the sole judge what his answer would be." It is not even for the Court, let alone the prosecutor, to "participate with him in this judgment"; therefore whether the Government believes it had a "more reasonable explanation" for petitioner's conduct is wholly immaterial.

Here, petitioner, a notorious underworld figure, was being examined in a grand jury investigation recognized by the trial judge as running "the gamut of all crimes covered by federal statute" (R. 11). Likewise, Max H. Goldschein,

the special deputy attorney general in charge, had stated publicly that the Government was "having trouble finding some big shots" (R. 11), and approximately one week prior to petitioner's appearance before the grand jury had sought from this same trial judge a bench warrant for Weisberg because he had been unable to serve the subpoena on him (R. 15).

In this setting (and we believe the "setting" in these matters is all-important*), petitioner was asked when he had last seen Weisberg, whether he had talked to him during the week and whether he knew where he was (R. 3).

The Court of Appeals treated petitioner as if he were any law-abiding citizen who had been asked the same question and held that the danger of incrimination was not sufficiently close to permit petitioner to exercise his privilege (R. 25).

This ruling directly conflicts with that of the Court of Appeals for the Ninth Circuit in *Doran v. United States*, 181 F. 2d 489 (C. A. 9). There the witness was asked the question "Have you seen X recently?". The Court said (page 491):

"It appears that the United States Attorney [Goldschein] has caused subpoenas and bench warrants to be issued for them. The applications charged not only [the sought after witnesses] with deliberate avoidance of service of subpoena, but also that 'various witnesses' for whom subpoenas had issued 'have been following a common course of conduct in avoiding service and impeding the functioning of said grand jury' (Emphasis supplied). This plainly applied to [the missing witnesses] and with equal plainness charged a conspiracy to obstruct the administration of justice in violation of 18 U. S. C. A. §§1501 and 371.* * *

* Cf., *State v. Thaden*, 43 Minn. 253, 45 N. W. 447, *United States v. Cussen*, 132 F. 2d 413 (CCA 2), *Ex parte Irvine*, 74 Fed. 954 and *United States v. Weisman*, *supra*.

It is no answer to say that petitioner might well have answered these questions "yes" or "no" because it must be obvious that Mr. Goldschein would not have stopped there but would have proceeded with questions leading ultimately to a conspiracy to obstruct justice. As was said in *Estes v. Potter*, 183 F. 2d 865, 867 (C. A. 5):

"* * * it would be idle merely to ask the witness if he knew the aliens and, upon his answering yes, then to stop his examination; and the law never requires the doing of an idle thing."

Likewise, if petitioner had answered the questions asked, we contend that there would be a serious question whether he could properly thereafter refuse to answer the obvious follow-up questions, such as, "When you last talked to Weisberg, what was your conversation?" *Jane Rogers v. United States* — U. S. (95 L. ed. Advance Reports 374). As was stated in the dissenting opinion:

"Moreover, today's holding creates this dilemma for the witness: On the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question."

Petitioner's refusal to answer these questions was based on his fear that by so doing he would furnish a "link in the chain" for a future prosecution for conspiracy to obstruct justice. It seems strange that the language of this Court in such cases as *United States v. Burr*, 25 Fed. Cas. No. 14, 694, 38 and *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, has been so distorted and emasculated over the years as to cause the conflict in the decisions which we find here. But all of these conflicts, we submit, have been resolved in the recent opinion of this Court in *Blau v. United States*, 340

U. S. 159* where the true meaning of the *Burr* case was clearly and forcibly reiterated.

The Courts of Appeals for the Second and Ninth Circuits, among others, have had no difficulty in construing the Fifth Amendment "as it has been interpreted from the beginning". In *United States v. Weisman*, 111 F. 2d 260 (C. A. 2), the questions were, first, whether the witness had ever received any cables at a certain restaurant in New York and, second, whether he knew anyone who had visited, lived in, or stayed at Shanghai in the years 1934 to 1939. The Court, speaking through Judge Learned Hand, held:

"The two questions were on their face innocent, and it lay upon the defendant to show that answers to them might incriminate him. * * * Whether he had the burden of proof upon that issue we need not decide, for we think in any case he proved his excuse. Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available. * * *

"Further, the defendant was plainly justified in supposing that he was the object of pursuit by the district attorney; and while the irresponsible gossip of a newspaper is a weak reed, there is always the possibility that it may for once be right. It directly pointed to the defendant, and it would certainly have disturbed any but the most hardy. * * *

* See also *Irving Blau v. United States*, — U. S. —, 95 L. ed. Advance Reports 234.

"But we are to take the question in its setting * * * and the information of which we may reasonably infer the prosecution had possession. * * * Again we are to remember that the defendant had been the object of much more than casual interest by the prosecution. These things made it perilous for him to answer. * * *

In *United States v. Zwillman*, 108 F. 2d 802 (C. A. 2), the questions propounded to the witness were "who were your business associates" in certain prior years. The Second Circuit (Augustus N. Hand, Circuit Judge) there held:

"The defendant claims, and we think with fair reason, that the answers sought would be a link in the chain of incriminating testimony and that he ought not to be compelled to give them—at least if he could show that he was likely to be endangered by answering."

The case of *Alexander v. United States*, 181 F. 2d, 480 (C. A. 9) is to the same effect. There the question was whether the witness knew the names of the county officers of the Los Angeles Communist party. The Court there recognized that newspaper articles concerned with the inquiry were "competent to show the information available to appellants and the reasonableness of their fear of prosecution" and went on to say (page 485):

"In that case [*Arndstein v. McCarthy*, 254 U. S. 71, 65 L. Ed. 138] Arndstein was held not in contempt because, as stated by the court: 'It is impossible to say from mere consideration of the question propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity. The writ should have issued' (Emphasis supplied). * * * Here it is clearly possible to say that the answers would tend to impugn Alexander and the others of the group."

In *United States v. Cusson*, 132 F. 2d 413 (C. A. 2) the witness was asked and refused to answer the question whether she had met "any of the Groveses" upon a visit to Philadelphia in 1941. The Court (Learned Hand, Circuit Judge) there held:

"This question was harmless enough on its face and an answer to it could become incriminating only by reason of some setting which made it a possible step in the disclosure of a crime. The issue on this appeal is whether the record contains enough evidence of such a setting. We think that it does. * * * Her excuse for refusing to say whether she met and talked to "the Groveses" was that it might serve as a link in establishing that they had told her to go to Mexico so as to avoid being called as a witness upon their trial and that this would tend to prove that she had conspired with them to obstruct justice."

The facts concerning Weisberg were well known to both the lower court and to Mr. Goldschein. The latter had publicly complained from the date of the swearing of the grand jury that "we are having trouble finding some big shots" (R. 11). He had appeared in open court, several days prior to petitioner's testimony before the grand jury, seeking a bench warrant for Weisberg (R. 15). Petitioner, in response to Mr. Goldschein's question, replied that he knew that there was a subpoena out for Weisberg because he "heard about it in court" (R. 3).

We submit that petitioner should not be held accountable for failing to prove formally that which was well known to the court and to the prosecutor.

Obstruction of justice is a federal offense, as is conspiracy to obstruct justice. It must be obvious that if petitioner had been compelled to answer, he might very well have incriminated himself of the crime of conspiracy to obstruct justice by furnishing a link in the chain of evidence. If

these questions had been answered, the next questions would have been what the conversations were. As afore-said, there is a serious question whether, having answered the prior questions, the witness could have claimed his privilege as to the subsequent ones: Cf. *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819, *Jane Rogers v. United States*, supra.

We submit that petitioner was in genuine fear when he refused to answer and that his fear was a substantial one. This is not a game between a witness and the Government but rather a vital question of the enforcement of constitutional rights on behalf of citizens. This Court has always given full effect to the limitation on governmental powers prescribed by the Fifth Amendment and we urge it to do so here.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

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